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STATUTES.

AUTHORITIES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 207.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

vs.

UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANT'S BRIEF.

STATEMENT OF CASE.

The appellant is a corporation organized February 15, 1890, under the Laws of Maryland. During the period involved in this controversy it carried on, in its own office building in Baltimore, the following businesses: (1) Surety business, that is, insuring the faithful performance of duties by principals; (2) banking business, that is, receiving moneys upon deposit, sub-

ject to check, draft, or order, loaning money on notes secured by stocks and bonds, and receiving commercial paper for collection for its depositors; (3) safe deposit business, that is, renting safe deposit boxes; (4) acting as trustee upon bond issues by other corporations.

During the years in question the capital and surplus of the corporation were as follows:

1898 capital.....	$1,000,000	surplus.....	$1,000,000
1899 capital.....	1,500,000	surplus.....	1,850,000
1900 capital.....	1,500,000	surplus.....	1,850,000
1901 capital.....	2,000,000	surplus.....	2,550,000

During each of these years the corporation was required to pay and did pay, to the authorized revenue officers, as special bankers taxes, under Section 2 of the Act of June 13, 1898, the following sums:

Year ending June 30, 1898, upon	$25,000 at $2 per thousand	$50.00
Year ending June 30, 1899, upon	1,125,000	2,250.00
Year ending June 30, 1900, upon	1,500,000	3,000.00
Year ending June 30, 1901, upon	1,500,000	3,000.00
	Making a total of	$8,300.00

These sums were covered into the Treasury of the United States. The Law under which the officials of the Government assumed to assess and collect these taxes reads as follows:

> "That from and after July 1, 1898, a special tax shall be, and hereby is, imposed annually as follows, that is to say:
>
> Bankers using or employing a capital not exceeding the sum of twenty-five thousand dollars ($25,000), shall pay fifty dollars ($50); when using

or employing a capital exceeding twenty-five thousand dollars ($25,000), for every additional thousand dollars in excess of twenty-five thousand dollars ($25,000), two dollars ($2), and in estimating capital, surplus shall be included. The amount of such annual tax shall in all cases be computed on the basis of the capital and surplus for the preceding fiscal year.

"Every person, firm and company and every incorporated or other bank, having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon drafts, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange or promissory notes are received for discount or sale, shall be a banker under this act: Provided, That any savings bank having no capital stock, and whose business is confined to receiving deposits and loaning or investing the same for the benefit of its depositors, and which does no other business of banking, shall not be subject to this tax."

The appellant duly filed its application in the Treasury Department praying for a refund of the said sum of $8,300.00 under the Act of July 27, 1912, which reads as follows:

"That all claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected under the provisions of Section twenty-nine of the Act of Congress approved June 13, 1898, known as the War Revenue Tax, or of any sums alleged to have been excessive or in any manner wrongfully collected under the provisions of said Act, may be presented to the Commissioner of Internal Revenue, on or before the first day of January, 1914, and not thereafter.

"Sec. 2. That the Secretary of the Treasury is hereby authorized and directed to pay, out of any

> moneys of the United States not otherwise appropriated to such claimants as have presented or shall hereafter present their claims and shall establish such erroneous or illegal assessments and collection, any sums paid by them or on their account or in their interest, to the United States under provisions of the Act aforesaid."

The application for refund was in all respects complete, regular and in accordance with the law and regulations and supported by the evidence and powers required. It asked for a refund upon the ground that the taxes in question had been assessed and collected on appellant's capital and surplus which were not used or employed in the banking business within the meaning of the Revenue Act first above quoted. The application was rejected and this suit was brought to recover the amount. The lower Court upon a hearing, and upon its findings of fact, rendered judgment against appellant and dismissed the action. It is the contention of appellant that upon the findings of fact made by the Court judgment should have been in favor of appellant.

The findings to be especially considered which, in the opinion of appellant, call for a reversal of the judgment, are the Fourth, Fifth, Sixth and Seventh (Record, pp. 20-22).

Upon reading these findings it will be seen:

1. The money derived from sale of appellant's capital stock and the money of the surplus funds were *permanently* invested in real estate, bonds, and other securities called by appellant and designated on its books as "capital stock department." The invested assets of this department—the capital stock money and surplus—were designated "capital stock investments,"

and *all* operations relating thereto were recorded in records distinct from the records of all other business transacted by the Company. The investments were kept alone in a separate compartment of the company's vault in envelopes ear-marked "C-S" (Finding IV, Rec. 20).

2. In like manner the business of the banking department was kept separate from the other business conducted by plaintiff. Money received from deposits was invested in stocks and bonds which were kept in separate envelopes in separate compartments of the company's vaults, and ear-marked "I-D" or "E-D," according as they represented general individual deposits, or estate deposits. The records of the business of the banking department were kept in separate books as accounts separate from those of the capital stock department (Finding VI, Rec. 21).

3. Earnings from the two departments were carried to the undivided profits account at the end of each year after the expenses of each department had been paid and charged to the appropriate department, upon the separate accounts of that department, out of the earnings of that department. Part of the income from each department was maintained as cash, and remained uninvested, part being carried by each department as counter cash, and the balance deposited in the company's various depositaries. The money so deposited was not segregated according to the source from which it came, though the source of the items comprising its total amount was recorded in the respective books of each department (Finding VII, Rec. 21).

It may be contended by the Government that the judgment of the court below finds justification in certain statements contained in Finding III, Record 20,

to the following effect: that part of plaintiff's capital was invested in its office building, which was used in part for its banking business, but what proportion thereof does not appear from the evidence; that the banking business was conducted as a part of its other business, and the expenses incident thereto, as well as salaries and wages, were paid out of the same fund or account as all similar expenses, salaries and wages were paid in the conduct of all its business; that such expenses incident to the conduct of the banking business were paid out of the undivided profits account, but the amount or proportion thereof as compared with other expenses does not appear from the evidence.

These statements in Finding III, Record 20, we submit do not modify or control the specific facts contained in Findings IV, VI and VII, Record 20-21. They are general in character, and if in conflict with the specific facts set forth in the later part of the findings, it is clear that the latter will govern.

> Hidden v. Jordan, 28 Cal. 301, 305-6.
> Warder v. Enslen, 73 Cal. 291.

Finding III, Record 20, contains the following: "Part of plaintiff's capital was invested in said office building. * * * Some portion of this building was used or employed by the plaintiff in its banking business, but what proportion * * * does not appear from the evidence."

This general statement is to be read in connection with the further findings of the Court:

(a) That the capital and surplus were permanently invested in real estate, etc. (which, of course, includes the office building) and these investments constituted

the "capital stock department" (Finding IV, Record 20).

(b) That all operations of *this department* were recorded in separate records, and the investments kept by themselves in a separate compartment and bore an especial identifying mark (Finding IV, Record 20).

(c) That the business of the *banking department* was kept separate from the other business of the plaintiff. The moneys deposited were invested in securities kept in separate envelopes, in separate compartments, and bore special identifying marks. The business of the banking department was kept in separate books of account wholly apart from the accounts of the capital stock department (Finding VI, Record 21).

(d) *That the expenses of each department were paid and charged to the appropriate department in its separate accounts, out of the earnings of that department.* (Finding VII, Record 21.)

These expenses, since no exception is made, of course, include any expenses incident to the use of a part of the office building, and it becomes immaterial that the proportion of the building which was so used, is not shown. As appears by these findings, both as a matter of bookkeeping and as a physical fact, there was a complete separation of the business of the banking department from the other businesses of the company. The operations of the capital stock department did not appear in the accounts of the banking business, and conversely the operations of the banking business did not appear in the records of the capital stock department. If any part of the capital or surplus had been used in the banking business the books of that department would properly have con-

tained entries showing such use, but as there were no such entries it would seem to follow that there was no such use.

It is stated further in Finding III, Record 20, "The plaintiff's company's banking business was conducted as a part of its other business, and the expenses incident to the conduct of the banking business * * * were paid in the same manner, and out of the same funds or account that all similar expenses * * * were paid in the conduct of its business."

Again, this general finding is to be read in connection with the specific findings already adverted to:

(a) That the capital and surplus were invested *permanently* and kept separate and apart, both as a physical fact and as a matter of accounting (Finding IV, Record 20).

(b) That the business of the banking department was carried on independently of the other department and the moneys belonging to it separately invested and kept separate and apart, both as a physical fact and as a matter of accounting (Finding VI, Record 21).

(c) That the expenses of the banking business were paid out of its earnings and charged upon its separate accounts, and only after these payments had been made and separate accounts had been made, was the balance of the earnings carried to the undivided profits account (Finding VII, Record 21).

Whatever is meant, therefore, by this general statement in Finding III, Record 20, it certainly cannot be construed to mean that any part of the capital or surplus, or any earnings resulting from the use of the capital or surplus, was used or employed in the banking business, since all of it was set apart, held and used in the capital stock department.

Furthermore, the Court of Claims found (Finding V, Record 21) that the banking department during each of the years in controversy had a net income running from over $43,000 in 1898 to over $92,000 in 1901. This net income was the amount derived from the utilization of the deposits after returning to the depositors the amount of interest allowed thereon. This would seem to demonstrate that no part of the capital or surplus of the appellant company was used or employed in the banking business since none was necessary.

In other words, the business of the two departments was in no manner commingled, but the funds of each were held and employed and the business relating thereto was conducted as though these two departments had been wholly separate and distinct corporations.

Again, it is recited in Finding III, Record 20: "The expenses incident to the conduct of the banking business were paid out of the undivided profits accounts but * * * the amount * * * or proportion * * * does not appear from the evidence."

By reference to Finding VII, Record 21, it will be seen, however, that the earnings from the two departments were not carried to the undivided profits account until the end of each year *after the expenses of each department had been paid out of the earnings of that department and charged to it upon its separate accounts.*

From all this it is apparent that the business of the banking department consisted of receiving, investing and loaning the money of its depositors, and paying the same out upon their checks and orders, and that no part of the capital stock or surplus was actually

used or employed. The only two operations the appellant conducted which would bring it within the statutory definition of "banker," were receiving money on deposit subject to check, and loaning money on collateral security. It is obvious that receiving money on deposit was not an operation which required the use of the capital or surplus. The loaning of money, however, did require funds out of which the loans might be made. That they were not made out of the founds of the capital stock department is clear since during all this period no part of the capital or surplus was in the form of money, but all was permanently invested in real estate and securities kept intact in the vault of the company. Moreover, the loaning of money by the banking department from the capital or surplus would have necessitated the bringing together of the accounts of the two departments, whereas, the Court has distinctly found they were kept separate. The Court also found that the income of the banking department was derived from the investment of the deposits (Finding V, Record 21). It seems clear that there is nothing in the general statements contained in Finding III, Record 20, which modify the specific facts found by the Court in Findings IV, V, VI and VII, Record 20-21. If, however, this Court should conclude that the findings are inconsistent and incapable of being harmonized there is respectable authority to the effect that those findings most favorable to the appellant should be accepted. Ellerman v. Hyman, 192 N. Y. 113, 117; 127 Am. St. Rep. 862, 864. In any event such inconsistencies would preclude an affirmance of the judgment of the Court below, 38 Cyc. 1986.

HISTORY OF STATUTES IMPOSING SPECIAL BANKERS TAX.

The Act of June 13, 1898, imposing the special excise tax on bankers for the purpose of raising revenue to conduct the Spanish War was not a new form of taxation. That statute was modeled after the act of June 30, 1864 (13 Stat. 251), which statute likewise was a war revenue measure. With the exception of a few sentences clearing away ambiguities, the Act of 1898 follows closely the Act of 1864. The Act of 1864 imposed a special tax on bankers in the following language:

> "One. Bankers using or employing a capital not exceeding the sum of fifty thousand dollars, shall pay one hundred dollars for each license; when using or employing a capital exceeding fifty thousand dollars, for every additional thousand dollars in excess of fifty thousand dollars, two dollars. Every person, firm, or company, and every incorporated or other bank, having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order, or where money is advanced or lent on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or sale, shall be regarded a banker in this act; provided, that any savings bank having no capital stock, and whose business is confined to receiving deposits and loaning the same for the benefit of its depositors and which does no other business of banking, shall not be liable to pay for a license as a banker." (13 Stat. 251.)

The Act of 1864 was amended in 1866 (14 Stat. 115), when the opening sentence was changed to read as follows:

> "Banks chartered or organized under a general law, with a capital not exceeding $50,000, and bankers using or employing a capital not exceeding the sum of $50,000, shall pay $100; when exceeding $50,000, for every additional thousand dollars in excess of $50,000, two dollars."

Hence, while the Act of 1864 (the model of the Act of 1898) made the amount of the tax dependent upon the capital *used or employed in the banking business*, whether the banker was corporate or individual, the Act of 1866, distinguished between corporate and individual bankers and imposed the tax, in the case of corporate banks, upon their share capital, however employed, but, in case of individual bankers, only upon the capital *actually* employed. The cause of this amendment is indicated by Judge Woodruff in the case of *Clark v. Bailey*, 12 Blatch, 156, which arose under another act levying a tax on bank "capital," also originally passed in 1864, but amended in 1866 in precisely this same particular. Judge Woodruff pointed out that the purpose of the amendments of 1866 was to make the tax against corporate banks assessable upon their share capital without regard to its actual employment, while the tax against individual bankers was to be assessed upon capital actually *employed* in the banking business.

The case was carried to the Supreme Court of the United States, where, under the name of *Bailey vs. Clark*, 21 Wall. 284, the judgment was affirmed.

The Court in this case defined the term "Capital" in the taxing statute as follows:

> "When used with respect to the property of a corporation or association the term (capital) has a settled meaning. It applies only to the property or means contributed by the stockholders as the

fund or basis for the business enterprise for which the corporation or association was formed'' (p. 284).

The acts of 1864 and 1866 were repealed, but in reenacting the bankers tax in 1898, the distinction between individual and corporate banks was abolished and the tax upon bankers of both classes was based upon the capital used or employed in the banking business. The Act of June 13, 1898, was repealed July 1, 1902. The tax on bankers was again restored by the Act of October 22, 1914 (38 Stat. 750), which reads as follows:

> ''Bankers shall pay $1.00 for each thousand dollars of capital used or employed and in estimating capital, surplus and undivided profits shall be included. The amount of such annual tax shall in all cases be computed on the basis of the capital, surplus and undivided profits for the preceding fiscal year. Every person, firm, or company, and every incorporated or other bank, having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange or promissory notes are received for discount or sale, shall be a banker under this Act; PROVIDED, That any postal savings bank, or savings bank having no capital stock, and whose business is confined to receiving deposits and loaning or investing the same for the benefit of its depositors and which does no other business of banking, shall not be subject to this tax * * *.''

This latter Act was repealed to take effect December 31, 1916.

DECISIONS OF THE FEDERAL COURTS RELATING TO THE SPECIAL BANKERS' TAXES.

Section II of the Act of June 13, 1898 (30 Stat. 448), was considered in the cases of the Farmers Loan and Trust Company and the Central Trust Company of New York vs. Treat, Collector, 171 Fed. Rep. 301. The decision of the United States District Court was affirmed by the Circuit Court of Appeals, February 14, 1911, in Treat vs. Farmers Loan and Trust Company, 185 Fed. Rep. 760-765. These appear to be the only cases in which the Special Bankers Tax imposed by that Act was considered and the judgments in these cases were acquiesced in by the United States and paid by appropriation of Congress in 1912.

When these judgments were paid, however, the claim of the appellant and of others similarly situated could not be considered because of Section 3228 of the Revised Statutes, which required a claim for refund be made within two years from the date of payment of the tax.

Congress, however, enacted the Act of July 27, 1912 (37 Stat. 240), *supra*, page 3, under which the claim of the appellant was duly filed.

The lower court in the Central Trust Company case (*supra*) said:

> "It will be observed that the 'capital and surplus' which is subjected to the tax, is that which is used or employed by the banker; *i. e.*, in the banking business. The evidence shows that the entire amount of these undivided profits before, during and at the end of the fiscal year, were invested in municipal and railway bonds and in the stocks of corporations and were not in any sense employed in the business of banking, although the ownership of this large amount of securities

> available to make good the losses in any of the enterprises which the corporation was conducting naturally increased its credit generally."

In affirming this case the Circuit Court of Appeals said in Treat vs. Farmers Loan and Trust Co. (185 Fed. 760):

> "The questions for consideration are whether the capital and surplus of either the plaintiff companies (also Central Trust Co.) were subject to the tax and whether the interests and costs of either were properly awarded against the defendant.
>
> The agreed statements show that the capital and surplus of both companies are permanently invested in stocks and bonds; that the only business the companies do as bankers within the definition of banking in the act, is the opening of credits by deposit or collections of money and paying the amount on checks, draft or order, and the loaning of money on stocks, bonds or secured paper. This business is done entirely by means of the depositor's money. As the act only taxes the capital used or employed in banking, we think the circuit Judge was entirely right in holding as a matter of law, that the plaintiffs, not using their capital or surplus in banking, were not subject to the payment of any tax thereon. No doubt they got credit by the amount of their capital and surplus, but Congress evidently intended to put corporations upon the same basis as individuals, and it would be obviously very unfair to tax an individual upon his whole fortune because he was using part of it in the banking business."

The intention of Congress as thus set forth is evidenced and emphasized by the fact that by the Act of 1864 (*supra*, p. 11), individual and corporate banks were upon the same footing. The Act of 1866 (*supra*,

p. 11), however, taxed corporate banks according to the amount of capital, irrespective of its use, while it taxed individual bankers on capital actually used or employed. It is significant that in re-enacting the bankers tax in 1898, Congress did not use the language of the 1866 Act, which discriminated against chartered or organized banks, but reverted to the language of the Act of 1864, wherein corporations and individuals were again placed upon the same footing.

The assessment of the tax for the year 1898 was upon the minimum amount, that is, upon an amount *not exceeding* $25,000. The taxing officers by thus imposing the tax upon a *nominal* capital and surplus evidently considered that the *actual* capital and surplus was not used or employed in the banking business. This practical construction of the law is a recognition of the correctness of our position.

After the passage of the Act of 1914 (*supra*, p. 13), litigation arose as to the construction of that Act and the reported cases are as follows:

I. Anderson, Collector, vs. Farmers Loan and Trust Company, 241 Fed. Rep. 322.

II. Real Estate Title Insurance and Trust Company vs. Lederer, Collector, 229 Fed. Rep. 299; 263 Fed. Rep. 667.

III. Germantown Trust Co. vs. Lederer, Collector, 263 Fed. Rep. 672.

IV. Fidelity Trust Company of Maryland vs. Miles, Collector, 258 Fed. Rep. 770.

V. Title Guarantee and Trust Company vs. Miles, Collector, 258 Fed. Rep. 771.

In the first of these cases, Anderson vs. Farmers Loan and Trust Company, 241 Fed. 322, the plaintiff was again the Farmers Loan and Trust Company, the same plaintiff who had recovered under the act of 1898. The lower court rendered judgment for the plaintiff. On appeal the Circuit Court of Appeals reversed the judgment of the lower court upon the ground that the burden of proof was upon the plaintiff to show that its capital surplus and undivided profits were not used or employed in the banking business. It was conceded therein that if it had been shown what part of its capital and surplus had not been used or employed in the banking business, the Trust Company would have been entitled to a refund of that part of the tax that was measured or determined by the capital and surplus not used or employed in banking.

In the case of Real Estate Title Insurance & Trust Company vs. Lederer, 229 Fed. 299; 263 Fed. 667, the banking business was a part of the business conducted by the company. It was also engaged in the four distinct businesses of title insurance, trust, safe deposit, and real estate. The entire capital, surplus and undivided profits were used as a basis in computing the tax to be paid by it as a banker. The business of each of the departments of the company was conducted separately, the facts being substantially identical with the facts in the instant case. The Circuit Court of Appeals, reversing the lower Court, held the Trust Company entitled to recover. The Court said:

> "The plaintiff Trust Company, by virtue of corporate powers thereto enabling it, is, besides banking, engaged in four other distinct businesses: first, insuring titles; second, executing trusts; third, safe deposit, and fourth, real es-

tate; and in carrying such title, trust, safe deposit and real estate businesses, the plaintiff does none of the several acts which the statute defines as constituting banking; that is to say, it does not receive deposits, make collections, loan money or discount or sell notes. From which it will appear that if the plaintiff company were only carrying on, first, its title insurance business; second, its trust business; third, its safe deposit, and fourth, its real estate business, it would not be subject to tax under this Act as being engaged in the banking business. Such being the undoubted fact, does the further fact that plaintiff adds a fifth business, viz., that of banking, to its corporate acts, thereby subject to the taxing scope of this Act not only $1 for each $1,000 of capital used or employed in its banking business, but also for each $1,000 used or employed (first) in its title business, (second) in its trust business, (third) in its safe deposit, and (fourth) in its real estate business. We think the statement of such proposition is of itself an answer to the contention. And for this reason, first, the act by its terms does not impose a tax on the capital or surplus used in title, trust, safe deposit or real estate business; second, the act not expressly imposing a tax on such title, etc., business, such tax can not be imposed by implication for the authorities are uniform that taxes being a statutory burden imposed by the government upon its citizens, they must have express statutory warrant; * * *"

The case of Germantown Trust Company v. Lederer, 263 Fed. 672, was decided, affirming the court below, upon the ground that the Germantown Trust Company had failed to meet the burden of proof upon it to show that its capital and surplus were not used or employed in its banking business. As in Anderson vs. Farmers Loan and Trust Company, *supra*, the plain-

tiff's right to recover was conceded if it had shown, as in the case of the Real Estate Title Insurance and Trust Company, its capital and surplus was not used or employed in banking.

The Maryland District Court sitting without a jury found in the case of Fidelity Trust Company vs. Miles, 258 Fed. 770, that the plaintiff had not shown that its capital was not used in the banking business. At the same time the same court held that the Title Guarantee & Trust Company, 258 Fed. 771, was entitled to recover for that portion of the tax computed upon its capital which it had shown was not used or employed in its banking business.

The Court of Claims in the Union Trust Co., case 55 Ct. Cl., page 424, referred to by the Court of Claims as authority for dismissal of the instant case, held that in computing the tax on bankers the entire capital of the banker, corporate or individual (for the taxing act makes no distinction between them), was to be considered in computing the tax, whether it was used or employed in the banking business. That would mean that a department store with, for example, a capital and surplus of $5,000,000, that merely as incident to its business and for convenience of its customers, collected drafts for its customers and held the money so collected subject to check, but which did not use or employ its capital in so doing and which did no other banking business as defined by the Act, would be subject to a tax of $10,000 under the interpretation placed upon the act by the Court of Claims. Such construction is contrary to the plain intent and purpose of the act, as shown by the various decisions hereinbefore cited *supra*.

If an individual or corporation uses part of his or

its capital in banking and part in a manufacturing business, it cannot be held that as far as the manufacturing business is concerned, the person or corporation is a banker upon whom the tax is levied. The error of the court below lay in putting all the emphasis upon the term "using capital" and none upon the word "bankers." The tax is an excise tax on "bankers." The term "bankers" is further limited by the phrase, "using or employing capital." The amount of the tax is determined or measured by the amount of the capital employed. Spreckles Sugar Refining Co. vs. McClain, 192 U. S. 397. If in the instant case the tax is to be measured not by the capital employed in banking but by the capital employed in the surety, safe deposit and trust business, the tax is not a tax on bankers, but upon the right to conduct a surety, safe deposit and trust business. Taxes upon the surety business were imposed by the same act, under the stamp tax provisions, Schedule "A," at p. 461, each bond being required to have stamps affixed of ½ of one cent for each dollar of the premiums charged.

In view of the identity of the two statutes, that is, the Act of June 13, 1898, and the Act of October 22, 1914, it may be assumed with entire certainty that Congress meant by the Act of October 22, 1914, precisely what it meant by the Act of June 13, 1898, and that considerations which control the judicial construction of the Act of June 13, 1898, control equally the judicial construction of the Act of October 22, 1914.

Therefore it is fair to assume that Congress in enacting the Act of October 22, 1914, adopted the unreversed, publicly reported judicial construction of these provisions contained in the Act of 1898 and intended in adopting them to have them read and considered in the light of the prior decisions.

Real Estate Title, Insurance and Trust Co. v. Lederer, 263 Fed. 667, 671-2.

It is therefore submitted that the history of the legislation, the language used, and the judicial interpretation of that language, leave no room for doubt as to the soundness of our position. But if the Court should still entertain any doubt it must "be resolved in favor of those upon whom the tax is sought to be laid." (Judge Gray in the Spreckels case, 113 Fed. 247.) This old and familiar rule of construction applicable to all forms of taxation, but particularly special taxes, has come down to us unchanged from the English courts which first announced it. (Eidman vs. Martinez, 184 U. S. 578; Treat vs. White, 181 U. S. 264, 267.)

It may be argued by the appellee that the potential capital resources of the company, though perhaps not actually used in the banking business, were the basis of the company's ability to do a banking business, and therefore for the purposes of taxation, should be considered as used in the business. It is not, however, the possible or even the probable use of the capital that determines whether the tax will lie, but its actual use and employment in the banking business.

In the case of the Alabama Great Southern R. R. vs. U. S., 49 Ct. Cl. 522, the question was whether under the land grand statutes the militia of the states held the status of troops of the "United States."

The Court said at page 537:

> "That the National Guard, composed of Volunteers, may become troops of the 'U. S.' within the meaning of the said land grant act is not to be questioned, but, as was said at the bar in this

case, it is not the potentiality but the actuality of being in the service contemplated by the Constitution which fixes their status as troops."

This was approved in U. S. vs. The Union Pacific Ry., 249 U. S. 359.

LIMITATION.

The refunding act was passed July 27, 1912 (27 Stat. 240), and the limit of time within which claims might have been filed with the Commissioner of Internal Revenue was set at January 1, 1914. The claim was filed on November 22, 1913, and action was brought in this court on July 25, 1918. The period of limitation does not begin to run until January 1, 1920.

U. S. vs. Hvoslef, 237 U. S. 1.
Sage vs. U. S., 250 U. S. 33.
Kahn *et al.*, vs. U. S. No. 52, October Term, 1921.

PROTEST.

Protest at the time of payment of the tax was not necessary in order to allow suit to be brought under a refunding act.

U. S. vs. Hvoslef, 237 U. S. 1.
U. S. vs. Fidelity Trust Co., 222 U. S., 158 Law Ed. 137.
U. S. vs. Jones, 236 U. S. 106.
Sage vs. U. S. 250 U. S. 33.

LACHES.

The appellant's petition in the Court of Claims was dismissed upon the authority of the Union Trust Company against the United States, 55 Court of Claims 424, and the Union Trust Company was charged with

laches in that decision. Final action by the Court of Claims in the Union Trust Company case is awaiting the disposition of this case by this Honorable Court. The facts in this case disclose that there was no laches on the part of the appellant. The cases of the Farmers Loan and Trust Company vs. Lederer, 185 Fed. 760, and the Central Trust Company vs. Lederer, 185 Fed. 765, were decided by the Circuit Court of Appeals on the 14th day of February, 1911. Under the revenue laws both the Union Trust Company of Indianapolis and the appellant company were barred under Section 3228 of the Revised Statutes from presenting a claim for refund. Congress enacted the refunding act of July 27, 1912 (37 Stat. 240), and allowed the taxpayer under that Act until January 1, 1914, to file claim for refund of taxes. The appellant's claim was filed on the 22d day of November, 1913. The Commissioner of Internal Revenue, however, did not pass upon this appellant's claim until April, 1917, when it was rejected, and suit in the Court of Claims was filed therein on July 25, 1918, or a year and one-half before appellant's claim would have been barred by the statute. The recital of the facts shows that there was no laches on the part of the appellant.

MOTION TO REMAND.

The appellant heretofore submitted to this Honorable Court a motion to remand the cause to the Court below with directions to make from the evidence already in the record certain additional findings, which would have removed any possible conflict in the findings as now made. This motion was overruled without prejudice. If the Court shall now be of opinion that any such conflict exists, or that the findings are insufficient in any of the particulars specified in the motion, we respectfully ask the Court to again consider whether the motion should be granted.

Upon the findings now in the Record before this Court we submit, however, that the judgment of the Court of Claims should be reversed with directions to enter judgment for the appellant.

SIMON LYON,
R. B. H. LYON,
Attorneys for Appellant.

GEORGE SUTHERLAND,
Of Counsel.